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Supreme Court of the United States

October 1956 Term

No. 304 MISC.

LEONARDO SALEMI,

Petitioner,

v.

WILFRED DENNO,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Statement

This is a petition for a writ of certiorari to the United States Court of Appeals, Second Circuit, to review an order of that court, entered July 13, 1956 (rehearing denied August 16, 1956), which unanimously affirmed an order of the United States District Court for the Southern District of New York, entered February 16, 1956, denying the petitioner's application for a writ of *habeas corpus.*

The petitioner's application for a writ of habeas corpus sought to secure his delivery from the custody of the respondent Denno, the Warden of New York State's Sing Sing Prison, where he is confined pursuant to a judgment of the Court of General Sessions, New York County, ren-

dered June 24, 1953, which convicted him of the crime of Murder in the First Degree [N. Y. Penal Law, §§1044 (1), 1045], after a trial before GOLDSTEIN, J., and a special jury, and sentenced him to death (4188-9).*

This judgment was affirmed by the New York State Court of Appeals on March 12, 1954 (306 N. Y. 863, 946, 978), and reaffirmed by that Court—on reargument after denial of a second motion for a new trial—on July 8, 1955 (309 N. Y. 208).

A stay of execution previously granted by the United States Court of Appeals is still in effect by mutual agreement of the parties herein. In the event this petition is denied, the New York Court of Appeals must, on proper application, fix a new date of execution of the petitioner (see N. Y. Code Crim. Proc., §503).

Prior Proceedings

The Trial

The petitioner was tried on an indictment for Murder in the First Degree which charged that, on or about February 26, 1952, with malice aforethought, he shot one Walter Forlenza with a pistol, causing his death the following day (7-9).

The evidence established that, in the early evening of February 26, 1952, Walter Forlenza was fatally shot by the petitioner as the deceased was sitting in a dining room in the rear of a bar and grill in New York City and County.

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* References, unless otherwise indicated, are to folios of the printed record on appeal to the Court of Appeals of the State of New York.

The petitioner, who had apparently entered the tavern a few minutes before the crime, stood briefly at the bar in the front of the establishment and then went back into the dining room to perpetrate the killing. After firing two shots into the deceased's head, he ran back through the bar room and made his escape, remaining unapprehended for about ten weeks.

Proof of the petitioner's guilt came, in large part, from two witnesses who were present in the saloon when the crime occurred, each of whom knew the defendant by sight. One of these witnesses was Paul Janson, a patron of the bar for about seven years (295, 297). He testified that, on the day of the shooting, he was standing at the bar drinking beer and watching television when he noticed the petitioner alongside of him (298-301, 304, 351-3, 411-23, 516-8). About five minutes later, he heard two shots from the dining room in the rear and turned to see the petitioner "leaning over a table looking at something" (305-6, 312-3, 353-4). Thereafter, the petitioner, who had been holding a gun, ran the full length of the establishment, passing Janson on the way and pocketing his gun as he left (316-8). Looking back into the dining room again, Janson saw a man (the deceased Forlenza) "topple off" a chair and fall to the floor (318-21). Janson himself then departed and went back to work (321).

The other witness, who also was present in the bar on the evening of the fatal shooting, was a bartender and part owner of the establishment. He testified that he saw the petitioner and Janson standing next to each other at the bar and also observed the deceased seated at a table in the dining room (184-98). A few minutes later, while he was

in the kitchen, he heard the shots and entered the dining room and observed the deceased falling from his chair to the floor (199-206). While the testimony of this witness served only to place the petitioner at the scene at the time in question, it attained greater significance in view of the alibi defense offered.

In addition, there was evidence of a dying declaration made by the deceased about three and a half hours before his death, in which he declared that it was the petitioner who had shot him as a result of an argument (682-3, 683-4, 724-6). Finally, testimony was adduced to the effect that ten weeks of police investigation, commencing immediately after the shooting, had failed to locate the petitioner (875-84, 894-7, 906, 939-43, 947).

As a defense to the charge, the petitioner advanced an alibi, which rested chiefly upon the testimony of two witnesses who placed him at or near a restaurant in another county at the time of the crime.

The First Motion to Set Aside the Verdict and for a New Trial

On November 21, 1952, the day after the conclusion of the trial, the witness Janson was committed to Bellevue Hospital for observation as to his mental condition, was diagnosed as being psychotic, and, on December 4th, was sent to Pilgrim State Hospital for treatment (see 1936-41, 1952, 1954). Prior to the date set for the petitioner's sentence—December 12th (1772)—his counsel was advised of these facts (2881-3), sentence was apparently postponed pending Janson's recovery, and counsel was further

informed that the hospital records would be made available to him for use on a prospective motion for a new trial (2884-6).

Such a motion was made on March 12, 1953 (1798-1800)—after Janson had recovered—and a full hearing thereon was held in the Court of General Sessions beginning May 19, 1953 (2020-2). The motion had two distinct and unrelated phases, one of which was that the witness Janson was insane and incompetent at the time he testified, the only phase of that motion here involved.

We set forth below as succinctly as possible the evidence relating thereto.

As to the alleged insanity or incompetency of the witness Janson

This claim was based upon information, allegedly discovered by the defense after the verdict, that the People's witness Janson, who had identified the petitioner as the killer, had, while confined as a material witness in a prison during the trial, rammed his head into some iron bars in a suicide attempt two days before he took the stand. Also, as already indicated, the day after the conclusion of the trial, Janson was committed for observation as to his mental condition, was diagnosed as being psychotic, and was thereafter sent to a state hospital for treatment (1936-41, 1952, 1954). On the basis of these facts, the petitioner contended that Janson was insane at the time of his testimony and, hence, incompetent as a witness (1801-5).

1. The trial testimony on the subject

Janson, who appeared in court with a bandage on his head (326), was cross-examined concerning the reason therefor. He testified that he "ran into some bars" and that he had seen the bars (326-7). Questioned further the next day, he said that he "blew * * * [his] top" and that he had run into the bars "purposely" (480-3, 623-4). In response to other inquiry, he stated that he had never been in a mental hospital, nor had he ever been treated by a psychiatrist (484).

2. The petitioner's evidence on the motion for a new trial

Dr. Leonard Cammer, a psychiatrist, prepared an affidavit in which he stated that he had read Janson's trial testimony, which he found to be "contradictory" in nature, and had examined abstracts of the records of the hospitals (wherein Janson had been examined and treated) relating to his background history, including his attempt to commit suicide while confined as a material witness (1875 *et seq.*; see Exhs. B, C, on motion). Based upon the foregoing material and information, Dr. Cammer concluded that Janson "was in an abnormal state of mind at the time he testified," and that he was "not competent to testify in Court on any matter on November 13th and November 14th, 1952" (1889-93; also 2164-5).

At the hearing on the motion, Dr. Cammer acknowledged that he had never personally examined Janson, and, in fact, had never even seen him (2040, 2163-4). His opinion as to his mental condition was based solely on the material to which he referred in his affidavit (2039-43, 2164-5). Almost all of the information contained in the hospital

records was, of course, the result of interviews with Janson when he was concededly psychotic (2094-5).

According to the witness, persons who attempt suicide usually do so to expiate guilt feelings, which Janson had, although the desire for self-destruction could result from excessive fear (2080-1, 2084, 2119-20, 2132). The doctor acknowledged that Janson, who knew that another eye witness in the case had been strangled, might have had much to fear and that such would be a normal reaction (2111-4). However, in Janson's case, the psychiatrist said, that would have been merely a contributory factor and his mental condition stemmed principally from his own personality development and paranoid delusions, which pointed to a "disturbance that existed long before he ever set foot in the bar and grill" (2091-3, 2097-8, 2161-3).

Dr. Cammer stated that a psychotic person might, "By coincidence," tell the truth (2119, 2128, 2140) but that Janson's testimony, including his identification of the petitioner, could not be "reliable" (2128-9, 2140), and that he was "incapable" of telling the objective truth at the time he testified (2130-2, 2180-1), even though his account might have actually been in accord with the objective facts (2130-1).

Various detectives, who had been assigned to guard Janson before and during the trial while he had been held as a material witness, testified as to his behavior in a local hotel, where he had been taken after he had requested not to be returned to the jail because he was "kept close in there" (2224-7, 2252-3). Indicating that at first Janson was "all right" (Whelan 2309) and that, on one occasion,

he went to a bowling alley and helped keep score while the officers bowled (Healy 2284-6, 2291-8; also Janson 3163-6), they stated that, about November 18th or 19th [four or five days after he had testified at the trial], he began to slacken off on his eating and smoking (Mengrone 2232, 2239-41, 2243-4, 2257-8; Whelan 2309-10). One of the detectives [Mengrone] stated that he had reported Janson's behavior to the trial prosecutor on either November 18th or 19th (2240-4), and another [Whelan] said that he had mentioned it to the prosecutor on November 20th (2310-2). When Janson finally refused food, he was taken to the District Attorney's Office on November 21, 1952, examined by Dr. Lichtenstein, a psychiatrist employed by that office, and sent to a hospital (Mengrone 2232, 2235, 2238-41, 2258-62; Whelan 2309-12).

Finally, **Max Fruchtman**, the petitioner's trial counsel—an attorney with twenty-four years experience in practicing criminal law (2887)—testified that he recalled Janson stating at the trial that he had deliberately rammed his head into some bars and that he had said that he "blew * * * [his] top" (2869-77, 2892).

Saying that he had been misled by the court's questioning on the subject and by Janson's replies on the stand, counsel stated that he had no idea that Janson's action was a suicide attempt and did not learn of it until some months later when he was shown the hospital records and the official report of the incident (2874-7, 2893-4, 2897-8, 2934-5, 2938-9). He conceded, however, that, after hearing Janson testify concerning the self-inflicted injuries, he made no effort to obtain the jail records nor had he communicated with anyone at the jail in order to find out precisely what had happened (2887-92, 2903-4, 2940).

3. The People's evidence

Paul Janson testified that, after another witness in the case, a bartender, had been found strangled, he had been committed as a material witness and had been "only too glad" that it was done (2962-6). As the trial date approached, Janson, owing to his knowledge of the bartender's fate, was obsessed by "fear and terror" of retaliation if he appeared as a witness and identified the petitioner, and he began to get edgy and nervous (2968, 2971, 3001-2, 3098-100, 3386). Finally, shortly before he was to testify, he rammed his head into some bars at the jail in an attempt to kill or injure himself so that he could not be called as a witness (see 326, 480-4; 2967-72, 3001, 3037-9, 3109). He was fully aware of what he was doing at the time (2969-72). When the attempt failed, he "snapped out of it" and decided that he "would do as I said I was going to do, tell the truth and nothing but the truth" (3147).

Janson recalled testifying at the trial, and stated that his answers there were truthful (2973-8). He reiterated his previous trial testimony identifying the petitioner as the man he had seen in the bar and grill with a gun in his hand (2975-8, 2981-2, 3006, 3110-3, 3119-20).

Janson again acknowledged—as he had at the trial (626-44)—that he had concealed his knowledge of the identity of the killer until July 23, 1952, when, after talking with his wife and daughter, he finally told the whole truth and picked out a picture of the petitioner (3002-6, 3047-58, 3117). His secretiveness up to that time resulted from fear of injury or murder of himself or some member of his family (3061-2, 3383-4). His fear increased after

he identified the petitioner as the killer (3384-6). Indeed, he still was fearful of his safety and was still under police guard (3071-3, 3097, 3394).

Dr. Perry M. Lichtenstein, a psychiatrist attached to the District Attorney's Office, testified that, on November 21, 1952—after the trial—he had examined the witness Janson and concluded that he was at that time psychotic and in need of psychiatric care, although he could not then tell how long Janson had been in that condition (3427-8, 3431-4, 3456, 3524-5, 3534-5, 3546-67). As a result, he wrote a letter to Bellevue Hospital requesting his admission in the Psychiatric Division (3433, 3544-5).

The psychiatrist further testified that he thereafter read Janson's trial testimony and found his answers responsive, relevant and coherent, and nothing to indicate that the witess had behaved in any unusual manner (3434, 3437). The doctor's opinion, based in part on this testimony, was that, at the time he testified, Janson was not psychotic or insane, but rather was in contact with reality (3435-43, 3456-7, 3763-5).

Dr. Lichtenstein's diagnosis of Janson's mental condition on November 21st was that he was suffering from a "reactive depression of an involutional type" occurring at a certain time of life when Janson was under "great stress and strain," which could have been brought on as a result of fear (3454-6, 3704-7). However, he believed that this psychosis did not manifest itself during Janson's trial testimony (3456-7).

The psychiatrist disagreed with Dr. Cammer's opinion that Janson was psychotic when he testified and with his explanation of Janson's motivations, stating that Dr. Cammer's theory was "inconceivable" under the circumstances (3459-62, 3921-2).

Carroll W. Hayes, an assistant district attorney called as a defense witness on another phase of the case, testified that, in July, 1952, Janson had expressed fears for the safety of himself and his family, and appeared to be nervous and under a great strain (4037-8). However, Janson's statements were coherent and there was no indication that he was out of touch with reality or mentally unbalanced (4037-9).

Moreover, from then until the completion of his testimony on November 14th, Janson evinced no signs of mental unbalance (4039-40).

Mr. Hayes saw Janson on November 12, 1952, the day after the suicide attempt (4051-2). On that occasion, Janson told Mr. Dermody (the trial assistant) that he "blew * * * [his] top," that he was "scared stiff," and that he did not know why he had deliberately run into the bars (4052-3). After saying that he was "sorry," he promised to "tell everything" (4054). His answers at this interview were responsive and coherent, and nothing in his behavior suggested any abnormality (4055-6).

Further, after Janson's testimony on November 13th and 14th, Mr. Hayes observed nothing in his behavior, either "by word or action," indicating mental illness (4060-2).

The Decision of the Trial Court

This motion was denied by the trial judge, and was reviewed in connection with the main appeal to the New York Court of Appeals from the judgment of conviction.

The Main Appeal to the New York Court of Appeals

On the main appeal to the Court of Appeals, the petitioner advanced a number of claims, including the alleged insanity and incompetency of the witness Janson at the time he testified and the alleged failure of the prosecutor to make known Janson's suicide attempt. These were alleged merely as errors of law requiring reversal and a new trial. There was no claim that they constituted a violation of due process under the federal Constitution.

The Court of Appeals affirmed the judgment without opinion, three judges dissenting on the sole ground that the trial judge had failed to marshal the evidence properly under State law [*People* v. *Salemi* (1954) 306 N. Y. 863].

The Motion for Reargument or, in the Alternative, for Amendment of the Remittitur

The petitioner moved for reargument of the appeal on the ground that all previously argued questions—and some new claims—involved deprivation of due process under the federal Constitution.

In the alternative, the petitioner moved for amendment of the remittitur to recite that such matters had been presented and passed upon as federal questions.

The People opposed the first motion on the grounds (1) that the federal questions, having passed unnoticed on the appeal, offered no basis for reargument, and (2) that, in any event, there was no substantial federal question.

The motion to amend the remittitur was opposed on the ground that no federal question had, in fact, been presented or passed upon by the New York Court of Appeals.

The Court denied both motions [*People* v. *Salemi* (1954) 306 N. Y. 946].

The First Petition to this Court for Certiorari and for Re-Hearing

Thereafter, the petitioner applied to this Court for a writ of certiorari to bring up for review the judgment of the New York Court of Appeals, alleging all previously asserted claimed errors as violations of due process under the Fourteenth Amendment.

The People opposed the petition on the grounds (1) that no federal question had properly or timely been raised, presented or passed upon in the State courts, and (2) that, in any event, no substantial federal question was involved.

This Court denied certiorari and an application for a rehearing on the petition [*Salemi* v. *New York* (1954) 348 U. S. 845, 890].

The Application for a Writ of Error *Coram Nobis* and the Appeal From the Denial Thereof

Subsequent to the action of this Court in connection with the petition for certiorari, the petitioner, in December, 1954, applied to the trial court for a writ of error *coram nobis* to vacate and set aside the judgment. There were two phases to this application.

The first was that, since the People had, apparently successfully, opposed the motion for reargument in the New York Court of Appeals and the petition for certiorari in the Supreme Court on the ground that the alleged federal questions had not been properly or timely raised or presented, the petitioner was "candidly and avowedly" now making the application to meet those "objections." The petitioner thereupon asserted that his rights under the federal due process clause had been violated by the prosecution's use of the allegedly insane and incompetent witness Janson.

In the second phase, the petitioner claimed to have some new evidence concerning the dying declaration to the deceased's brother, James, which would show (1) that James was not at the hospital at the time he said the dying declaration was made, and (2) that, moreover, the declaration could not have been made because the deceased was unable to talk due to his injuries.

The People moved to dismiss the application as a matter of law, it appearing on the face of the papers that neither phase thereof fell within the scope of *coram nobis*. Thus, as to the phase concerned with Janson's alleged insanity, since the alleged due process question could have

been raised on appeal, *coram nobis* did not lie. As to the phase concerned with the alleged newly-discovered evidence, *coram nobis* also would not lie, the petitioner's appropriate remedy being a motion for a new trial under Section 465, subdivision 7 of the New York Code of Criminal Procedure.

The trial court dismissed the application. On appeal to the New York Court of Appeals, that Court, two judges dissenting, affirmed the lower court's decision, stating, however, that it was doing so "without prejudice to an application for a new trial in respect to the dying declaration" [*People* v. *Salemi* (1955) 308 N. Y. 863, 864].

The Second Motion for a New Trial

Following the decision of the New York Court of Appeals, the petitioner moved for a new trial on the ground of alleged newly discovered evidence. As already indicated, the motion had two phases: (1) that James Forlenza was not present at the hospital at the time, according to his trial testimony, that his brother had made the dying declaration; and (2) that, due to his injuries, the deceased had been unable to speak and could not have made the dying declaration.

The People not opposing, a full hearing was ordered and held. Set forth below as briefly as possible are the salient features of the testimony adduced.

A. As to James Forlenza's presence at the hospital

1. The trial testimony on the subject

At the trial, **James Forlenza** had testified that, as nearly as he could recall, the declaration was made to him between 5:00 and 5:30 p.m., February 27, 1952 (679-80; *cf.* 695-6, 721). On cross-examination, he was confronted with his grand jury testimony, in which he had fixed the time as between 4:00 and 4:30 p.m. (826-8), and with a statement made to an assistant district attorney in May of 1952, in which he set the time as somewhere around 1:00 p.m. (787). He testified, however, that he had no clear recollection of the time the declaration had been made (696).

Also at the trial, **Detective Nilo Mengrone,** called by the defense, testified that he had been at the hospital from about 4:30 to about 4:55 p.m., and that he had not seen James there then (915-7) or at any other time when he, Mengrone, had been present there (925).

2. The petitioner's evidence at the new trial hearing

Dorothy Cancro, nee Cleghorn, a registered nurse, testified that, from the time of her arrival at 10:00 a.m., February 27, 1952, until the deceased was taken to the operating room, she was "constantly" at the deceased's bedside, except for a half-hour lunch period from 12:30 to 1:00 p.m. (S. M. 92-3, 96-7, 130).* During that time, she saw only one person—an unidentified man—with his head inside the oxygen tent covering the deceased (S. M. 127, 129-30, 131). That was at 1:00 p.m., on her return from lunch (S. M. 127).

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* References "S. M." are to pages of the typewritten stenographer's minutes of the hearing on the new trial motion.

Patsy Yannotti stated that, in company with Tony Iodine [Anthony Donato], he went to the hospital to see Forlenza, arriving a few minutes before 5 o'clock and going to Forlenza's bedside (Yannotti affidavit, pp. 4-5). Apart from hospital personnel, Evelyn Forlenza, an unidentified woman, and a police officer, no other person was present while he was there (*id.*, p. 5).

Dr. Kenneth J. Strully, who attended the deceased at the hospital, testified that he saw the deceased at about 4:45 p.m., and remained with him until he was taken to the operating room (S. M. 199). Not to his recollection, the doctor said, did anyone other than hospital personnel speak to Forlenza during that time (S. M. 200-1).

3. The People's evidence

Anne Forlenza, sister of the deceased, testified that, as she was leaving the hospital between 4:00 and 4:30 p.m., she saw James Forlenza in the lobby downstairs (S. M. 436-7, 438).

Jeanne Forlenza Brownson, another sister of the deceased, testified that, at about 4:30 p.m., while she and Maud Forlenza were with the deceased, James Forlenza arrived and was left alone with the deceased (S. M. 372-3, 377-8, 379-80, 381, 395, 397, 421). As she left the hospital, she noted, from a clock, that it was "almost a quarter of five" (S. M. 374, 377, 378, 422).

Maud Forlenza, wife of the deceased's brother James, testified that she telephoned her husband a little after 4:00 p.m., and that he arrived at the ward at about 4:15 to 4:30 p.m. (S. M. 511-2, 513, 519-20, 531). She departed for her

place of business and her husband returned there about 5 o'clock (S. M. 512-4, 520, 542).

Evelyn M. Calabro—formerly the deceased's mistress, who testified at the trial as a defense witness under the name "Forlenza," and there stated that she did not see James Forlenza at the hospital at any time between 4:00 and 5:30 p.m. (1358, 1370)—testified that she did not see James at any time on February 27th (S. M. 714, 750), but said that she was not at the bedside constantly, being away from time to time for periods of five or ten minutes and sometimes for as much as a half hour (S. M. 556).

Anthony Donato ["Tony Iodine"]—concededly a person with a long criminal record, and a friend of both the deceased and the defendant (S. M. 722-4, 729-30, 745-62, 775, 777-9, 784-92)—testified that, some time after 3:00 p.m., February 27th, he went with Yannotti to see the deceased (S. M. 741, 819, 822). They left for a short while, returned and waited around until the deceased was about to be operated on (S. M. 742-4, 819-20, 848-9). He did not see James Forlenza while he was there (S. M. 827, 829).

Patrolman William J. Snyder, assigned to duty at the deceased's bedside from 4:15 p.m. until after Forlenza's death (S. M. 462, 464, 466-7, 471-3), testified that he was not at the bedside constantly and could not recall seeing any man or men there, not even Detective Mengrone (S. M. 462-3, 465, 473-4, 477, 479; *cf.* Mengrone, *supra*, p. 16).

Patrolman Dominick Perrino, on duty at the hospital from 8:00 a.m. to 4:00 p.m., testified that he was not at the bedside at all times, but that he recalled seeing both male and female visitors (S. M. 485-7).

B. As to the deceased's ability to speak

1. The trial testimony relative thereto

Cross-examining the People's first witness, an assistant medical examiner, defense trial counsel questioned him only about whether the deceased's injuries were such that he would have been unable to speak (115-6). The doctor stated that he did not know (115-6).

James Forlenza testified that his brother, the deceased, had told him that "Nardi," the petitioner, was the person who shot him (682-3, 724-6), and that, on another occasion, the deceased spoke to him concerning other matters (741-2, 758-9).

Evelyn Forlenza [Calabro], a defense witness, testified that she had spoken to the deceased a number of times in an effort to find out who had shot him, and that he had replied that he did not know and was simply having dinner when it happened (1358-9).

2. The petitioner's evidence at the hearing on the motion for a new trial

Nurse Anita Blanchard, on duty in the ward from the time of the deceased's admission until 7:00 a.m., February 27, 1952, testified that, as far as she remembered, he did not express any intelligible words and made no sounds except groans and moans (S. M. 12-4, 15, 18, 24, 29). She could not say, however, that the deceased was "incapable" of speech (S. M. 14, 15, 29; *cf.* 26-7, 28).

She acknowledged that she had told her superior, Miss Karasik, that she had overheard the deceased ask his wife

about their child (S. M. 30-2, 33, 35) but said she was not now sure (S. M. 32, 34, 35).

Patsy Yannotti stated that, when he and Tony Donato visited the hospital on the afternoon of February 27th, the deceased made some noise "but no words came from him" (Yannotti affidavit, p. 5).

Nurse Cancro testified that, as far as she was able to remember, she did not hear the deceased speak (S. M. 99, 105, 108, 111, 125, 135, 137) although an entry in her notes indicated that, during the afternoon, he was "Complaining" of more pain in his neck (S. M. 107-8, 137-9). She could not say that he did not say anything, but she could not remember that he did (S. M. 139-40, 147). She acknowledged that the deceased was conscious at all times while she was on duty (S. M. 98-9).

Dr. Kenneth J. Strully, who attended the deceased in the hospital, testified that, in his opinion, it was "impossible" for the deceased to speak or carry on even a short conversation while he was in the hospital (S. M. 203-4). That opinion was based on the following factors relating to Forlenza's condition and injuries: he was in a state of shock; he made no intelligible vocal responses to the witness' inquiries; the right side of the diaphragm was paralyzed; the right lung was collapsed; swelling in the neck had moved the trachea out of its normal position; several teeth were missing from the front of the mouth due to passage of the bullet; and the lower jaw was fractured on the left side (S. M. 183-8, 193-4, 209, 211, 214-6; compare 216-8, 221-2, 225-30, 230-3, 257, 270-2).

Dr. Lester Briedenbach, Director of Surgery at Beth David Hospital, testified that he had examined the deceased on the afternoon of February 27th (S. M. 283-5), and that, in his opinion, Forlenza could not speak (S. M. 297-8, 310-2). That opinion was based on the following factors: Forlenza was in moderate shock and breathing irregularly; there was a large swelling of the neck; there was, according to the witness' diagnosis, a fracture of the lower jaw; the tongue and floor of the mouth were swollen; the witness' personal examination of the deceased's mouth, made with a light and tongue depressor, revealed several front teeth missing from both the upper and lower jaws; and the deceased did not speak to the witness (S. M. 285-6, 288, 292-3, 295-6, 304-8, 308-9, 310-2).

3. The People's evidence at the hearing

Mary Ann Karasik, director of nurses at the hospital, testified that Nurse Blanchard had told her that she recalled overhearing Forlenza speak to his wife about their child (S. M. 327, 333-4, 346-7). Nurse Blanchard omitted mention of this when interviewed by defendant's counsel shortly before the hearing and told him that Forlenza had uttered no intelligible words (S. M. 335, 344). Questioned later by the witness about the omission, Nurse Blanchard said that she was "afraid to become involved" (S. M. 335, 336; compare Blanchard 30-2, 33, 35, 38, 38A).

Jeanne Forlenza Brownson and **Anne Forlenza**, sisters of the deceased, and **Maud Forlenza**, a sister-in-law, testified that the deceased had conversed with them at various times while he was in the hospital (S. M. Jeanne 370-3, 400; Anne 427-8, 429, 453-4; Maud 501, 503-7, 509-12, 514-6, 522-3).

Evelyn M. Calabro—formerly the deceased's mistress who testified at the trial, as a defense witness, to the effect that the deceased had spoken to her but had said that he did not know the identity of his assailant—testified at the hearing that he had conversed with her from time to time about various matters (S. M. 548, 550-4, 558-9, 615-8, 678). Moreover, she recanted her trial testimony that the deceased had said he did not know who shot him, and testified that, in fact, he had finally told her, after much urging on her part, that "Nardi" had done it (S. M. 551-4, 558-9, 616-8, 678).

Anthony Donato testified that, when he visited the hospital on the morning of February 27th, he spoke to the deceased, who told him that "Nardi" had shot him, asked him to warn "Albert to watch out," and said that he did not believe he was going to "make it" (S. M. 730-4, 845). The witness further testified that, at a later time, when both he and the petitioner were in City Prison, the petitioner admitted shooting the deceased and explained his reasons for doing so (S. M. 737-8, 801-4, 808).

Patrolmen Snyder and **Perrino** testified that, during the time they were respectively on duty at the hospital, they observed various persons talking to the deceased and saw his lips moving, but were unable to hear any conversation (S. M. Snyder 463-5, 474, 477, 479-81; Perrino 486-8, 491-4, 498-9).

Dr. Benjamin M. Vance, Deputy Chief Medical Examiner, refreshing his recollection from a report of the autopsy, at which he had been present, testified that the deceased's front teeth were intact and that no teeth had

been affected by the bullet wounds; neither jaw was fractured, though the upper had been "nicked" on the top at the base of the nose; neither lung was collapsed; and the trachea was undamaged (S. M. 902, 909-10, 917-22, 930-3, 939-40, 949-50). In his opinion, the deceased's injuries—individually or collectively—would not have prevented the deceased from speaking intelligibly "after a fashion" (S. M. 922-3, 932-4, 942-7, 950-1).

4. The exhumation proceedings

At the court's instruction, which met with the express approval of the defense, the deceased's body was ordered exhumed for re-examination, particularly with respect to the condition of the deceased's teeth, in view of the "sharp contradiction of testimony" on that subject (S. M. 923-4). The defense requested and received permission to have a physician of its own choice present at the exhumation and examination (S. M. 924-5).

The exhumation took place on April 14, 1955 (S. M. 952). Present, among others, were the court, defense counsel, the assistant district attorney, Chief Medical Examiner Milton Helpern, M. D., and Dr. Milton Birnkrant, a doctor engaged by the defense (S. M. 952). Each of these —except defense counsel and the prosecutor, who chose to watch the proceedings from a distance (S. M. 986, 986-7, 991)—were present during the actual physical examination of the body (S. M. 952, 984-5, 986).

Joseph Farenga, an undertaker, sworn by the court, stated that the body exhumed was that of Walter Forlenza (S. M. 954).

Dr. Milton Helpern performed the re-examination of the body, dictating his findings to a stenographer present (S. M. 954). The findings were concurred in, in their entirety, by the doctor engaged by the defense (S. M. 954-62).

Examination of the body revealed the following: all teeth present in the upper jaw were intact and firmly set, the third, or rear, molar on the left side being absent due to a prior extraction (S. M. 955-6); the upper jaw, the maxilla, was intact and unbroken, but grazed or nicked by the passage of a bullet (S. M. 956-7, 961); the teeth present in the lower jaw were regular in alignment and firmly set, all three molars on the left side being absent due to "old extractions" (S. M. 957-8); there was no unusual swelling on the right side of the neck (S. M. 955-9, 961); the mandible, or lower jaw, was not fractured or affected by the bullet wound which passed beneath it (S. M. 959-60, 961); there were no injuries or obstructions of the pharynx, larynx or trachea (S. M. 960-1).

5. The People's evidence, continued

Dr. Milton Helpern, Chief Medical Examiner, testified concerning his examination of the exhumed body of the deceased, which, in general, was simply repetitious of the findings described above (S. M. 997-1006). He stated that, in his opinion, there was no injury which would have made it impossible for the deceased to have spoken intelligibly prior to his death (S. M. 1006, 1079).

On cross-examination, he stated that, although the autopsy report of Dr. Weinberg had described one of the bullet wounds as having passed through "the floor of the

mouth," his personal examination of the exhumed body and probing of the bullet track had revealed that such was not the fact (S. M. 1047-82). He also said that he had found no injuries to the tongue or the muscles controlling it (S. M. 1053-8).

6. The petitioner's further evidence

Mary Forlenza, the deceased's widow, testified that, at different times, Jeanne and Maud Forlenza, and Tony Donato, had told her that the deceased had been unable to talk (S. M. 1102-3, 1106-7, 1113-4).

James R. Clark, a convict, testified that, while in prison shortly after the petitioner's conviction, Donato told him, Clark, that he knew that the witness who testified to a "deathbed statement" had lied because the deceased had been unable to speak (S. M. May 10, 1955, pp. 12-4, 21-4, 28-9, 43-5, 47-52).

Mrs. Maria Donato, Tony Donato's mother, testified that he had told her on three separate occasions that the deceased had been unable to talk (S. M. May 10, 1955, pp. 115-8, *cf.*, pp. 119-23, 135, 138-42).

7. The People's further evidence

Tony Donato, recalled, testified that he had never told anyone, including his mother, that the deceased had been unable to speak before he died (S. M. May 10, 1955, pp. 78, 81, 84).

Evidence Concerning Due Diligence

Max Fruchtman, Esq., the petitioner's trial counsel, who had signed an affidavit attached to the motion papers, was offered as a witness by the defense (S. M. 156-7). He was questioned by the prosecutor concerning his affidavit, primarily about two statements made therein to the effect that: (1) he had been taken completely by surprise when James Forlenza was called and testified to the dying declaration, due to the fact that the prosecutor had made no mention in his opening of such expected testimony; and (2) under the circumstances, he had acted with due diligence in the investigation into the dying declaration, it being "utterly impossible to do anything about this phase of the matter during the course of the trial and the proceedings thereafter had."

Calling to the witness' attention the fact that, at the trial, he had questioned the medical examiner, the People's first witness, only about whether the deceased's injuries would have prevented him from talking (S. M. 157-60), the prosecutor asked the witness whether, prior to the trial, he had received information that there would be testimony concerning a dying declaration (S. M. 160). The witness replied that he did not recall receiving any, but that he could not say "definitely" that he had not (S. M. 160). Although his examination of the medical examiner concededly reflected that the witness was interested in finding out whether the deceased was able to talk, the witness still claimed that he was taken completely by surprise by the dying declaration testimony (S. M. 160-1).

Also, Mr. Fruchtman acknowledged that, during the trial, he had the hospital records in his possession and introduced them in evidence; that the names of Dr. Strully and others appeared in those records; and that he had made no attempt to consult with those persons while the case was being tried (S. M. 162-3). It was conceded that, during the trial, no application was made by Mr. Fruchtman for an adjournment to allow him to consult with anyone at the hospital (S. M. 172-3).

Mr. Fruchtman further testified that he did not speak to Dr. Strully until sometime in December, 1954 (S. M. 163), over two years after the trial.

Mr. Fruchtman testified that the defense had encountered extreme difficulty in locating Mrs. Cancro, whose name did not appear in the hospital records, because the nursing registry files were confidential, and her married name, as finally learned from a State agency not long before the hearing, had been incorrectly spelled (S. M. 175). Mr. Fruchtman acknowledged, however, that no investigation in connection with the dying declaration had been initiated until after the Supreme Court had denied certiorari on November 22, 1954 (S. M. 176). He said that the matter had been discussed by the defense attorneys "a little while before that time," but nothing had been done about it while the case was pending in the Supreme Court (S. M. 176-8).

The Decision of the Trial Court

The trial court, in denying the moiton, held that the petitioner's evidence was not newly discovered within the meaning of the applicable statute (Code Crim. Proc., §465, subd. 7). It went on to decide, however, that that consideration aside, the evidence was not such as would "probably have changed the verdict" [*People* v. *Salemi* (1955) N. Y. L. J., April 28, 1955, p. 8, col. 4].

The New York Court of Appeals Decision of Affirmance

The New York Court of Appeals, in affirming the trial court's decision, likewise held that the alleged newly discovered evidence did not meet the statutory requirements of Section 465, subdivision 7 of the Code of Criminal Procedure as grounds for a new trial, and that the trial judge had not abused his discretion in denying the motion [*People* v. *Salemi* (1955) 309 N. Y. 208].

Thus, as to that phase of the motion dealing with James Forlenza's presence at the hospital, the Court found that the petitioner's evidence was "at best, * * * cumulative or designed merely to impeach or contradict the former evidence" (309 N. Y. 208, at p. 219), and that, in addition, the evidence—for the most part, at least—could have been produced at the trial with the exercise of due diligence (*id.*, at p. 218).

Similarly, with respect to that phase of the motion concerning the alleged inability of the deceased to speak, the Court pointed out that, since the defense had available in court the hospital records—which named three of the defendant's principal witnesses on the motion—and the autopsy report, the evidence offered on the motion could

have, with due diligence, been presented at the trial and was not, therefore, newly discovered (309 N. Y., at pp. 220, 221, 222-223, 226). Having chosen to attack the dying declaration in a different fashion at the trial, the Court added, the evidence offered to support a new theory "served only to impeach and contradict former evidence" which was "not new evidence of the sort warranting the granting of a new trial" (*id.*, at p. 221).

On the motion as a whole, the Court concluded that, as the trial court had found, the evidence adduced "far from 'probably changing the [jury's] verdict' would have made it easier for the jury to conclude that the defendant was guilty" (309 N. Y., at p. 226).

The three dissenting judges felt that the new evidence was such that it ought to be passed on by a jury.

The Application With Respect to the Remittitur

Upon the affirmance by the New York Court of Appeals, the petitioner, by letter of his counsel, dated July 11, 1955, applied to the Court to have its remittitur recite that various federal questions involving due process—including those here raised by the petitioner—had been presented and passed upon. The Court declined to do so, except for one issue with respect to the conduct of the exhumation proceedings, the only one in fact raised as violative of due process (309 N. Y., at p. 230).

The Second Petition to this Court for Certiorari

Thereafter, the petitioner applied to this Court for a writ of certiorari to bring up for review the re-affirmance of the judgment by the New York Court of Appeals, alleging as violations of due process under the Fourteenth Amendment the claims now asserted, which had been raised in the Court of Appeals merely as errors under State law.

The People opposed the petition on the grounds (1) that no federal question had been raised, presented or passed upon by the Court of Appeals; (2) that the Court of Appeals decision was based upon adequate State grounds under valid State procedure; and (3) that, in any event, the petitioner had not been denied due process.

This Court denied certiorari [*Salemi* v. *New York* (1956) 350 U. S. 950].

The Application for a Writ of *Habeas Corpus* and the Decision in the District Court

The petitioner next made application to the United States District Court of the Southern District of New York, for a writ of *habeas corpus*. This application was dismissed by CLANCY, U.S.D.J., on February 16, 1956, with an opinion (Petition, Appendix pp. 31-32) in which Judge CLANCY held that the petitioner had been accorded due process in the State courts.

The Affirmance by the United States Court of Appeals, Second Circuit

On appeal to the United States Court of Appeals and upon re-hearing, that Court unanimously affirmed the District Court's denial of the application for *habeas corpus*, holding that the State courts had given careful consideration to the petitioner's alleged newly discovered evidence and claims, that the denials of his motions for a new trial were based on adequate State grounds, and that "no constitutional issue is reached" [*Salemi* v. *Denno* (U. S. C. A. 2d Cir. 1956) 235 Fed. (2d) 910].

The Petitioner's Claims

In his petition—as in the federal courts below—the petitioner contends that, in the State proceedings, his conviction was obtained and upheld in violation of due process of law under the federal Constitution, in the following particulars:

(1) that an allegedly insane witness was permitted to testify against him;

(2) that the prosecution allegedly concealed the fact that that witness had attempted suicide two days before he testified; and

(3) that the deceased's brother perjured himself in testifying to a dying declaration of the deceased involving the petitioner, in that,

  (a) the deceased's brother was not at the hospital at the time, according to his trial testimony, the dying declaration was made, and

  (b) the deceased, due to his injuries, was unable to speak at all.

POINT I

The appellant was not denied due process in the state courts.

Section 465, subdivision 7, of the New York Code of Criminal Procedure, relating to new trials, provides as follows:

> "The court in which a trial has been had on an issue of fact has power to grant a new trial, when a verdict has been rendered against the defendant, by which his substantial rights have been prejudiced, upon his application, in the following cases:
>
> * * *
>
> "7. Where it is made to appear, by affidavit, that upon another trial the defendant can produce evidence such as, if before received, would probably have changed the verdict; if such evidence has been discovered since the trial, is not cumulative; and the failure to produce it on the trial was not owing to want of diligence. The court in such cases can, however, compel the personal appearance of the affiants before it for the purposes of their personal examination and cross-examination, under oath, upon the contents of the affidavits which they subscribed."

See also:

People v. *Eng Hing* (1914) 212 N. Y. 373, 386, 392-393;
People v. *Priori* (1900) 164 N. Y. 459, 472.

The granting or denial of such a motion rests within the sound discretion of the trial judge [see *People* v. *Sprague* (1916) 217 N. Y. 373, 380; *People* v. *Patrick* (1905) 182

N. Y. 131, 177-178, rearg. den. 183 N. Y. 52; *People* v. *Koepping* (1904) 178 N. Y. 247, 253; *People* v. *Buchanan* (1895) 145 N. Y. 1, 30-32].

Examination of the record of the State proceedings reveals beyond question that the exercise of that discretion by the trial judge in denying the motions for a new trial did not deprive the petitioner of due process and that the trial judge's decisions—and the New York Court of Appeals affirmances thereof—were wholly proper and well warranted by the evidence.

The petitioner received full and fair hearings on both motions. Of a trial record consisting of some 1400 printed pages, about 800 pages are devoted to the hearing on the first motion, concerned principally with the alleged insanity and incompetency of the witness Janson. With respect to the second motion, which attacked the trial testimony concerning the dying declaration, the State record consists of over 1300 typewritten pages. The appellant does not—and, indeed, could not—claim that he was denied complete and exhaustive hearings on the motions made by him.

Both the trial court and the New York Court of Appeals considered and reviewed the petitioner's evidence and claims. There has been, then, an "opportunity for reassessment, by • • • State • • • court[s]," of the bases for his applications for a new trial [see *Smith* v. *Baldi* (1952) 344 U. S. 561, 573 (dissenting opinion by FRANKFURTER, J.)] The petitioner was not, therefore, deprived of something to which he was entitled as a matter of right. Only

then could it be said that he has been deprived of due process.

The petitioner's real contention throughout seems to be that, on the evidence adduced, the trial court and the New York Court of Appeals made incorrect findings of fact and that he has been deprived of a positive right to have the evidence heard by a jury. As Judge CARDOZO once pointed out in *People* v. *Shilitano* (1916) 218 N. Y. 161, at pages 180-181, where a similar claim was advanced, the judge, not a jury, has that "solemn responsibility" and "duty" under the statute. And this Court has held that it will not review an order denying a motion for a new trial when such review is sought "on the alleged ground that the trial court made erroneous findings of fact," saying that an appellate court should not intervene unless such findings were wholly unsupported by evidence [see *United States* v. *Johnson* (1945) 327 U. S. 106, 111-112].

The State records reveal that the evidence concerning the issues raised by the petitioner's motions was in conflict [See: (1) as to Janson's mental condition, *supra*, pp. 6-11; (2) as to the dying declaration, *supra*, pp. 16-27]. As already observed, the trial court had exclusive discretion in acting thereon. The New York Court of Appeals found that that discretion had not been abused. Without any question, there is ample evidence in the record to support the State courts' findings, and, accordingly, there is nothing in this case warranting intervention or review by the federal Courts.

Filed as exhibits in the courts below, and in this Court in connection with the proceeding herein, are all of the

People's briefs in the New York Court of Appeals and this Court. These briefs contain detailed answers to the petitioner's contentions on the merits and, in the interest of brevity, those answers will not be repeated here. For the convenience of the Court, we list in tabular form in the footnote below where those answers may be found in those briefs.[1]

The petitioner relies heavily (Petition, p. 23) on the case of *Taborsky* v. *State* (1955) 142 Conn. 619, 116 Atl. (2d) 433, which, while involving a new trial based on the

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[1] ***A. As to the alleged insanity and incompetency of the witness Janson At the time he testified***

See: Main brief, Court of Appeals, pp. 74-93 (Exh. 1);
Rearg. brief, Court of Appeals, pp. 2-4 (Exh. 2);
Cert. brief, U. S. Sup. Ct. (No. 45 Misc., Oct. 1954) 4-9, 11-15 (Exh. 3);
Coram nobis brief, Court of Appeals, pp. 7-9 (Exh. 4);

B. As to the prosecution's alleged concealment of Janson's suicide attempt

See: Main brief, Court of Appeals, pp. 93-95 (Exh. 1);
Rearg. brief, Court of Appeals, pp. 2-4 (Exh. 2);
Cert. brief, U. S. Sup. Ct. (No. 45 Misc., Oct. 1954) pp. 13-14 (Exh. 3);
Coram nobis brief, Court of Appeals, pp. 7-9 (Exh. 4);

C. As to the alleged perjury of James Forlenza in testifying to the dying declaration

(1) *Concerning the time of his presence in the hospital when the declaration was made*

See: Coram nobis brief, Court of Appeals, p. 9 (Exh. 4);
2nd Rearg. brief, Court of Appeals, pp. 4-31, 40-42 (Exh. 5);
2nd Cert. brief, U. S. Sup. Ct. (No. 261 Misc. Oct. 1955) pp. 7-11, 22-25 (Exh. 6);

(2) *Concerning the deceased's ability to speak*

See: Coram nobis brief, Court of Appeals, p. 9 (Exh. 4);
2nd Rearg. brief, Court of Appeals, pp. 4-31, 42-43 (Exh. 5);
2nd Cert. brief, U. S. Sup. Ct. (No. 261 Misc. Oct. 1955), pp. 11-15, 22-25 (Exh. 6).

insanity of a trial witness, is not as persuasive or as applicable as the petitioner suggests. Thus, in that case, there was but a very minor conflict in the evidence concerning the witness' sanity—the overwhelming weight of the evidence was that the witness was insane. Here, the most credible evidence was that Janson was sane at the time he testified at the trial. Moreover, in the instant case, we have the witness Janson—after his recovery—reiterating his trial testimony. And finally, at the trial, there was another witness who corroborated Janson's testimony placing the petitioner in the bar at the time of the crime.

It is also to be noted that, with respect to the alleged perjury by James Forlenza concerning the dying declaration, it has never been asserted or claimed that, if perjury there was, the prosecution knowingly used it. Accordingly, as to that phase of the case, the petitioner must, on that ground as well, fail in his claim that he was deprived of due process [see *White* v. *Ragen* (1944) 324 U. S. 760, 764; *Pyle* v. *Kansas* (1942) 317 U. S. 213, 215-216; *Mooney* v. *Holohan* (1934) 294 U. S. 103, 112; *United States* v. *Rutkin* (U. S. C. A. 3rd Cir. 1954) 212 Fed. (2d) 641, 643; *United States* v. *Spadafora* (U. S. C. A. 7th Cir. 1952) 200 Fed. (2d) 140, 142].

From the foregoing, it is clear that, far from being deprived of due process, such was granted to the petitioner by the State courts at every stage of the proceedings. Accordingly, the District Court was fully warranted in so concluding and in denying the application for a writ, as well as was the Court of Appeals in deciding that all questions were properly determined on adequate State grounds.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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